No. 97 912 NOV 25 1997

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In The

Supreme Court of the United States

October Term 1997

ANTHONY MARCELLUS BAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The panel opinion allowance of the use at trial of the post arrest and post Rule 5 silence of the Petitioner is contrary to the Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), and a trial where the verdict is based on such a holding deprived the Petitioner of due process of law.

PARTIES INVOLVED

The following individual appeared as a defendant in the United States District Court for the District of Maryland as an appellant in the United States Court of Appeals for the Fourth Circuit: Anthony Baker.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on August 28, 1997, affirming his conviction for a weapons-related offense.

Opinion Below

A panel of the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion on August 28, 1997, which affirmed Petitioner's conviction for a violation of 18 U.S.C. 922(g). *United States v. Anthony Baker*, (No 96-4627). A copy of the opinion is reproduced at App. 1. There was no petition for rehearing or rehearing *en banc* filed.

Jurisdiction

This Court has jurisdiction of this direct criminal appeal pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

Statutes Involved

Petitioner was convicted after a trial by jury of possession of a firearm after conviction of a prior felony in violation of 18 U.S.C. 922(g). This statute is reproduced at App. 7.

Statement of Facts

Petitioner seeks review of the August 28, 1997, judgment of the United States Court of Appeals for the Fourth Circuit which affirmed his conviction for possession of a weapon by a convicted felon. By affirming the conviction, the opinion below mis-applies the holding of this Court announced in *Doyle v. Ohio*, 426 U.S. 610 (1976).

In January of 1994, the Petitioner was stopped by a member of the United States Park Police for a traffic offense. During the course of the stop, the officer noticed a bulge in the Petitioner's clothing which turned out to be a .32 caliber pistol. The Petitioner fled the scene and he was not indicted until September of 1994, when he was arrested for another traffic offense, at which time a one count indictment for

violation of 18 U.S.C. 922(g) was filed in the United States District Court of the District of Maryland.

Pursuant to a motion to suppress, the district court suppressed the weapon as evidence at trial in a December 1994, ruling. That decision was appealed by the government and reversed by the Fourth Circuit in *United States v. Baker*, 78 F.3d 135 (4th Cir. 1996). No further appeal in that matter was taken and the Petitioner went to trial on May 15, 1997. After a four day trial before a jury, the Petitioner was found guilty and latter sentenced to a term of 240 months.

In an appeal to the United States Court of Appeals for the Fourth Circuit, the Petitioner argued, among other issues, that he had been deprived of a fair trial by the improper impeachment by the government of his testimony concerning his pre-trial silence. The Fourth Circuit disagreed and affirmed the conviction by unpublished opinion on August 28, 1997. A copy of that opinion is attached at App. 1.

At his trial, the government produced a Park Police officer who testified that he observed the Petitioner with a handgun during a traffic stop involving several vehicles. The defense presented a witness who claimed that he was present at the traffic stop and observed the encounter between the officer and the Petitioner. This witness, who did not observe the Petitioner with a weapon, testified that he saw the Petitioner run from the scene with his hands in the air yelling "Don't shoot," after the police officer pointed a gun at him. This witness also indicated that he saw the officer recover the weapon from an area outside the path of the Petitioner's flight.

Following this witness, the Petitioner took the stand and testified that he did not possess the weapon in question and that he fled the scene of the traffic stop because he felt threatened by the police officer. On cross examination, the government questioned the Petitioner about three prior convictions and then asked the Petitioner about his failure to testify at the December 1994, suppression hearing:

Q. Now, Mr. Baker, you also attended the December 1994 hearing, did you not?

A. Yes, I did.

Q. And at that time you were represented by counsel, were you not, Mr. Baker?

A. Yes.

Q. And you understood long before that you were being charged because you were a convicted felon, and you understood that, right, Mr. Baker?

A. I was never in possession of a firearm.

Q. Did you understand the charges against you as being a convicted felon in possession of a firearm?

THE COURT: Just yes or no, did you understand the charges?

WITNESS: Yes.

Q. Now, Mr. Baker, you didn't testify at that December hearing, did you, Mr. Baker?

(May 16, Tr. 179-180)

After an objection by defense counsel, a bench conference was held at which time the district court sustained the objection and proposed an instruction. The government then indicated that it would ask additional questions about the Petitioner's post arrest silence and, despite the objections at the bench, the district court indicated its willingness to permit those questions.

The district court then instructed the jury that:

> Ladies and gentlemen, I need to give you an instruction. The question that Ms. Wilkinson just asked the witness had to do with whether he testified at an earlier hearing. At that time the defendant was exercising his constitutional right not to testify. He had no obligation to. And the fact that he might not have testified at an earlier hearing is something that you simply may not consider one way or another.
>
> Now, the defendant is on the stand now. He has waived his right against self incrimination and he may otherwise be inquired into. But as of that time, he did have a right not to testify and you can't draw any inference from that specific question and answer. You are to ignore the question and don't speculate on the answer.
>
> (May 16, Tr. 182-183)

Immediately after this instruction, the prosecutor resumed the cross examination of the Petitioner with the following:

Q. Mr. Baker, between the time of your arrest and the charges in this case [September 6, 1994], until today, May 16, 1996, have you told anyone from law enforcement, myself included, this story that you've told the jury here today?

A. Nobody from law enforcement, no.

Q. In fact, this is the first time that we've heard this story, isn't it. Mr. Baker?

A. This is the first time I chose to testify
(May 16, Tr. 183)

On May 20, 1996, the jury reached a verdict of guilty on the sole count of violation of 18 U.S.C. 922(g). On July 25, 1996, the Petitioner was sentenced to a term of 240 months. On August 28, 1997, the United States Court of Appeals for the Fourth Circuit affirmed the Petitioner's conviction in an unpublished opinion.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OF APPEALS AFFIRMED HIS CONVICTION IN THE FACE OF A VIOLATION OF THE CONSTITUTIONAL RIGHT TO REMAIN SILENT

The panel opinion in this case fails to correctly apply the rationale of *Doyle v. Ohio,* 426 U.S. 610 (1976), and in affirming the Petitioner's conviction in the face of improper impeachment, has deprived the Petitioner of due process of law.

Over twenty years ago, this Court observed that:

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.
>
> *United States v. Hale*, 422 U.S. 171, 180 (1975)

The rationale of the *Hale* decision served as the foundation for the decision by the Court in the following term in *Doyle v. Ohio*, 426 U.S. 610 (1976), in which the

Court concluded that a defendant cannot be impeached with his post arrest silence at trial in light of his Constitutional right to remain silent. The panel decision of the Fourth Circuit wrote that the Petitioner was not entitled to the protection of *Doyle* because of the lack of evidence that he was *Mirandized.* This conclusion is in error, both factually and conceptually and should be reversed.

1. The Panel Decision Ignored the Facts

If the invocation of the remedy and protections of *Doyle v. Ohio* is to be applied only after the formal application of *Miranda v. Arizona*, 384 U.S. 436 (1966), then the panel opinion is clearly in error. Even if the arrest that brought the Petitioner into the system is completely ignored, the undisputed fact is that this Petitioner was brought before a Federal Magistrate and presented on the charges in September of 1995. At that time he was advised pursuant to Rule 5 of the Federal Rules of Criminal Procedure that he was not required to make a statement and that any statement made by the defendant may be used against him. While this advise contains "no express assurance that silence will carry no penalty," like the *Miranda* warnings, the magistrate advice of rights is of a nature that "such assurance is implicit to any person who receives the warnings." *Doyle v. Ohio*, 426 U.S. at 618.

Thus, the court records demonstrate that this Petitioner was advised that he had the right to remain silent and guaranteed by a federal judicial officer that his silence would not be used against him. Moreover, the district court clearly recognized that the Petitioner was *Mirandized* at least as far back as his initial appearance before the magistrate when it gave its curative instruction after the first set of questions. The panel decision of the Fourth Circuit ignores this judicial issued guarantee and permits the government to

double-cross a defendant who exercises his constitutional rights.

Petitioner submits that at the very least when a right of this magnitude is questioned and there is a conflict in assertions between the parties, that the facts should be determined with a remand for fact finding rather than in the vacuum in which the Fourth Circuit proceeded.

But the panel opinion also makes another significant factual error when it concludes that the second line of questioning was unobjected to by Petitioner's trial counsel. Because this is essential to the panel's reliance on Federal Rule of Criminal Procedure 52, this disregard of the record is a critical flaw in the panel's conclusion.

The trial transcript indicated that after the first line of questioning was successfully objected to by the defense, the prosecutor asserted at the bench that "I think we can comment on the fact that he's never reported this to the police officers, never told his version of the story to us. That's fair cross examination... I think we are entitled to question him that he's never told his story to anybody before." (May 14, Tr. 180-181) The defense then continued to object to this proposal and the district court overruled the objection to the government's proposal for further questioning. (May 14, Tr. 181-182) The objection, lodged repeatedly by defense counsel, clearly established the petitioner's objection to additional questions in that area and the unmistakable fact that the district court was going to permit further questioning by the government of the defendant's silence regardless of further objections.

In light of this straightforward scenario, the panel opinion is simply wrong in concluding that the second line of questioning was unobjected to by the petitioner and that any error was waived and reviewable only under Rule 52. It is clear that any further objection would have been useless and a waste of time and that the district court was fully on notice of the position of the petitioner. *See, e.g., United States v.*

Berroa, 46 F.3d 1195, 1197 (D.C.Cir. 1995)[Rule 30 objection requirements satisfied when circumstances demonstrate court knew of defects without further objection].

Moreover, as this Court has held, "If a legal rule was violated during the District Court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection." *United States v. Olano*, 507 U.S.__, 123 L.Ed.2d 508, 519 (1993). Clearly there was an error of constitutional proportions which the district court was informed of and despite objection, permitted the government to proceed.

2. The Panel Decision Misconstrues the Protection of *Doyle*

The decision of the Fourth Circuit panel misconstrues the protections and remedy required under this Court's decision in *Doyle v. Ohio*. This Court recognized the fundamental unfairness and the danger of the use of silence against a defendant at trial when that silence is "insolubly ambiguous." *Doyle v. Ohio*, 426 U.S. at 617. The analysis which supported the Court's ruling in *Doyle* and earlier in *Hale* relied upon the underlying reasons for the principle of impeachment and the validity of using silence as a form of impeachment. *Hale,* 422 U.S. at 176 ["In most circumstances silence is so ambiguous that it is of little probative force"] The panel opinion below ignores this reasoning and attempts to fit the Petitioner's case into a mold for which it was not designed and which produces an ill-fated result.

A. *Greer v. Miller* is Inapplicable to this Set of Facts

The reliance of the panel opinion on *Greer v. Miller*, 483 U.S. 756 (1987) is incorrect. In *Greer*, a state, rather

than a federal case, the Court declined to exercise supervisory authority when it found only "a single question, an immediate objection, and two curative instructions" caused no violation of due process rights. *Greer v. Miller*, 483 U.S. at 766. Moreover, the decision not to impose a rule on state prosecutions was made in the context of a case in which other evidence that was properly admitted was sufficient to sustain the conviction. *Id.* At 767. No such claim can be made in the present case.

The Petitioner does not claim that the single initial reference standing alone is sufficient to implicate the concerns of due process. The Petitioner's complaint is that the series of improper questions, followed by an attempt at explanatory instruction that was limited solely to a defendant's right to remain silent at a prior court hearing which was followed immediately thereafter with the government's second inquiry on the Petitioner's silence gave the unmistakable impression to the jury that the line of questioning was entirely proper. Neither the holding nor the intent of *Greer* justifies such a conclusion.

Significantly, the district court's attempt at a remedial instruction fails to cure the problem because it does not inform the jury that a defendant has a constitutional right against self incrimination and that this right is not limited to prior court hearings. Nowhere is the jury ever told that all defendants have the right to refuse to speak with law enforcement authorities during the pendency of the case. Thus, the instruction did not serve to cure the constitutional problem with the second inquiry of the government.

Additionally, the sequence of objection, instruction, and repeated inquiry into the Petitioner's silence generated the powerful impression that the district court directed the second line of questioning and that it therefore was proper. This implied imprimatur by the district court clearly left the jurors with the impression that the prosecutor was asking these questions about the failure to inform law enforcement

authorities about his version of the facts with the encouragement of the district court. The sequence of events in the trial of this case strays too far from the scenario in *Greer* to allow that decision to serve as a legitimate basis for the conclusion of the panel opinion.

The multiple questioning in the present case more closely approaches that of *Wainwright v. Greenfield*, 474 U.S. 284 (1986), in which the Court reversed a conviction based on the prosecutor's repeated references to the post arrest silence of the defendant as an indicia of conduct that rebutted his claim of insanity as a defense. The *Wainwright* court concluded that although the ambiguity inherent in silence was a factor, it merely added weight to the enforcement of the constitutional right to remain silent and the use of such protected statements against a defendant was "fundamentally unfair." *Id.* at 295.

Another decision by this Court of significance which the panel opinion elected to ignore was that of *Brecht v. Abrahamson*, 507 U.S. 619 353 (1993). In *Brecht* the Court was faced with questions that covered both the pre-advisement period and post advisement time and ruled that

> "...the State's references to petitioner's silence after that point in time, or more generally to petitioner's failure to come forward with his version of events at any time before trial...crossed the Doyle line. For it is conceivable that, once petitioner had been given his *Miranda* warnings, he decided to stand on his right to remain silent to remain silent because he believed his silence would not be used against him." *Id* at 628-629.

The panel decision incorrectly applies the ruling of *Greer* and reaches a result that is fundamentally unfair.

B. *Fletcher v. Weir* is Inapplicable to this Set of Facts

Likewise, the reliance of the panel opinion on *Fletcher v. Weir*, 455 U.S. 603 (1982) is also incorrect. In *Fletcher*, this Court was faced with a situation in which state prosecutors were permitted to inquire about post arrest silence when the record did not demonstrate a *Miranda* warning.

As the *Fletcher* court observed: "The principles which evolved as the basis of decisional law dealing with appeals within the federal court system are not, of course, necessarily based on any constitutional principle. Where they are not, the States are free to follow or to disregard them so long as the state procedure as a whole remains consistent with due process." *Id* at 605. Thus, in permitting the impeachment, the Court ruled that "A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post arrest silence may be deemed to impeach a criminal defendant's own testimony." *Id.* At 607.

The panel opinion in this case overlooks the fact that this Petitioner was prosecuted by the federal government, and not by a state which makes an exception to post arrest silence as an impeachable area. Because the federal system has already been visited with this question in *Hale,* the question is not one of deference to state rules and careful balancing. That decision has already been made for Federal prosecutions and this Court has condemned the practice as fundamentally unfair to an accused.

This is particularly important in a case such as the present where the evidence of guilt is very close. To determine criminal liability, the jury had to weigh the word of the arresting officer against that of the petitioner. The defense presented other witness who disputed the police version and the judgment of Petitioner's credibility was the essential question for the jury decision. The closeness of the

case when compared to the magistrate's advice of the right to remain silent given pursuant to Rule 5 clearly demonstrates the fundamental unfairness of a trial in which the defendant is impeached with his exercise of a constitutional right. In such circumstances, it is clear that the error had a "significant and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Nor can it be reasonably said that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967)

C. *Raffel v. United States* Does Not Support the Panel Decision

The panel opinion appears to rest its decision upon the fundamental basis of *Raffel v. United States*, 271 U.S. 494 (1926). Petitioner suggests that this is a poor foundation for the decision and an examination of 70 years of subsequent opinions reveal *Raffel* does not justify the violation of due process that took place in this case.

In *Raffel*, the Court was presented with a situation in which a defendant was convicted at a second trial in which he took the stand and was impeached with his decision not to testify in his first trial. Asserting his privilege against self incrimination as the reason for his decision not to testify at the first trial, the Court, nevertheless, permitted the conviction to stand even though it was based on a cross examination (some of which was conducted by the trial court itself) during the second trial which contained an impeachment by silence. The Court concluded that Raffel's silence at the first trail was inconsistent with his testimony at the second trial and that silence could be used to impeach the credibility of his later representations. *Id.* 498-499.

The panel's apparent reliance on this decision is incorrect for two reasons. The first is that the panel equates the Petitioner's silence in this case with that of *Raffel*. That

equivalence was rejected by the Court in *Hale*, 422 U.S. at 175. Nor has that argument been successfully raised in any post *Hale* or *Doyle* cases.

The second reason that *Raffel* has no probative value for the facts of the present case is that it was decided long before either *Miranda* or the establishment or Rule 5 of the Federal Rules of Criminal Procedure. Both of these post *Raffel* developments in criminal procedure law establish what today are viewed as fundamental principles and which were never addressed in the *Raffel* decision. To bootstrap *Raffel* to the present and apply it to the Petitioner's case as the panel opinion does is to ignore 70 years of refinement that countless appellate reviews have produced. In fact, quite a few of the *Raffel* opinion's observations would no longer pass muster under present guidelines. (e.g. "The safeguards against self incrimination are for the benefit of those who do not wish to become a witness in their own behalf and not for those who do. *Id* at 499) Moreover, the underlying basis for the decision in *Raffel* has been distinguished so often that it provides no real basis for any current decision making. *See, Grunewald v. United States*, 353 U.S. 391 (1957)[prejudicial error to permit cross examination of defendant's use of Fifth Amendment privilege before grand jury]; *Stewart v. United States,* 366 U.S. 1 (1960)[rejection of harmless error argument by government in impeachment of defendant for silence at earlier trial]; *Johnson v. United States*, 318 U.S. 189 (1943)[[where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment]. It is important to note that as early as the *Grunewald* decision, a significant number of justices indicated that *Raffel* had no more vitality and had been overruled *sub silentio*. *Grunewald v. United States*, 353 U.S. at 426 (J. Black concurring).

To justify this Petitioner's conviction on such a discredited decision is a dangerous throwback to pre *Miranda* days and ignores the protections that are given

every criminal defendant in the standard Rule 5 advice of rights.

CONCLUSION

Wherefore, Petitioner respectfully requests this Court to grant the writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,
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Appendix to Petition for Writ of Certiorari

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY MARCELLUS BAKER,
Defendant-Appellant.

No. 96-4627

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Peter J. Messitte, District Judge.
(CR-94-361-PJM)

Submitted: June 3, 1997
Decided: August 28, 1997
Entered: August 28, 1997

Before WILKINS, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Kenneth M. Robinson, THE ROBINSON LAW FIRM, Washington, D.C., for Appellant. Lynne A. Battaglia, United States Attorney, Sandra Wilkinson, Assistant United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Anthony Marcellus Baker appeals from his conviction of being a felon in possession of a firearm, 18 U.S.C. § 922(g) (1994), for which he was sentenced to 240 months imprisonment. Baker claims, first, that he was improperly cross-examined by the Government concerning his pre-trial silence in violation of Doyle v. Ohio, 426 U.S. 610 (1976); and, second, that the trial judge coerced the jury into rendering its verdict. Finding no error, we affirm.

United States Park Police stopped Baker in January 1994 for running a red light. The officer noticed a bulge in Baker's pants which turned out to be a .32 caliber handgun. Baker fled the scene before he was arrested and was not indicted until September 1994. The district court granted Baker's motion to suppress the firearm on the grounds that the scope of the search was over-broad. Baker did not testify at the suppression hearing. This court reversed the district court, finding that it had improperly granted the motion to suppress. United States v. Baker, 78 F.3d 135, 138 (4th Cir. 1996). Baker was then tried by a jury.

Baker testified at his trial, giving contradictory testimony concerning the events on the evening he was stopped by the park police. On cross-examination, the Government's attorney asked Baker, in referring to the hearing on Baker's suppression motion,"Now, Mr. Baker, you didn't testify at that December hearing, did you?" Baker's objection was sustained, and the district court gave a

limiting instruction, admonishing the jury not to consider Baker's prior silence as evidence and not to draw any inference from the question or the answer. The following exchange then took place:

> Q. Mr. Baker, between the time of your arrest and the charges in this case, until today . . . have you told anyone from law enforcement, myself included, this story that you told the jury here today?
>
> A. Nobody from law enforcement, no.
>
> Q. In fact, this is the first time that we've heard this story, isn't it, Mr. Baker?
>
> A. This was the first time I chose to testify.

Baker did not object to this line of questioning. Following Baker's testimony, the defense rested.

The jury began deliberating at 11:50 a.m. on Friday. At 3:35 that afternoon, the jury sent a note to the judge stating that it was deadlocked. The judge denied Baker's motion for a mistrial, instead sending a note to the jury to "Please continue your deliberations and please save this note." At 5:40 p.m., the jury sent another note stating that it was still deadlocked and that "Juror No. 5 and No. 2 have been excused for next week." Before excusing the jury for the weekend, the judge stated that jurors 2 and 5 would not be excused because "this case will take priority." On Monday morning, the judge issued a modified Allen[1] charge. The jury recessed at 10:10 a.m. and at 10:51 a.m. announced it had reached a verdict. Baker appeals his conviction.

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[1] Allen v. United States, 164 U.S. 492 (1896).

a. Doyle claim. Baker first claims that he was deprived of a fair trial by the Government's questioning on crossexamination both as to his failure to testify at the suppression hearing and as to his failure to inform law enforcement authorities of his exculpatory explanation of the events surrounding his arrest. We find this claim to be without merit. Due process is not violated when a defendant who testifies in his own behalf is impeached with his prior silence. Raffel v. United States, 271 U.S. 494 (1926). The Supreme Court carved out an exception to this rule in Doyle v. Ohio, 426 U.S. 610 (1976), where it held that the Due Process Clause was violated by the use of the defendant's silence, at the time of arrest and after receiving Miranda[2] warnings, to impeach exculpatory testimony given for the first time at trial. Nevertheless, Baker's claim with respect to the prosecutor's questions regarding his failure to testify at the suppression hearing fails for two reasons.

First, the Supreme Court has held that limited questioning concerning a defendant's prior silence, followed by a curative instruction and the absence of improper closing argument, does not violate Doyle. Greer v. Miller, 483 U.S. 756 (1987). Here, the district court sustained Baker's objection and quickly gave a curative instruction. Further, the prosecutor made no reference to Baker's silence at the suppression hearing in her closing argument.

Second, there is no Doyle error where the defendant was not given Miranda warnings. Fletcher v. Weir, 455 U.S. 603, 607 (1982) ("In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."); see also Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980) (the use of prearrest silence to impeach a defendant's credibility does not violate

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2 Miranda v. Arizona, 384 U.S. 346 (1966).

the Constitution). Baker was never Mirandized--he fled the scene before he was arrested and was indicted nine months later, only after the park police officer identified him at an unrelated traffic stop. Baker voluntarily surrendered to the United States Marshal's Office and was never questioned by the police.

Baker did not object to the second line of questioning by the prosecutor. Accordingly, he waived appellate review of this claim, absent plain error. Fed. R. Crim. P. 52; United States v. Olano, 507 U.S. 725 (1993). Baker cannot show any error--much less, plain error--because, under Fletcher, the prosecutor's questions were not improper.

b. Allen charge. Baker claims that the judge improperly coerced the jury to render a verdict by (1) giving a modified Allen charge after the jury had twice indicated it was deadlocked and (2) failing to apprise Baker of the jury's numerical split prior to giving the modified Allen charge.

The necessity, extent, and character of any supplemental instructions are matters within the district court's discretion. United States v. Horton, 921 F.2d 540, 546 (4th Cir. 1990). The district court may provide a deadlocked jury with a modified Allen charge as long as the charge was fair, neutral, and balanced. See United States v. Sawyers, 423 F.2d 1335, 1342 n.7 (4th Cir. 1970) (setting forth an acceptable modified Allen charge).

The judge instructed all members of the jury--minority and majority--to reconsider their views in light of the opinions of the other side. Additionally, Baker's jury was instructed: "none of you should surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." We find that the instruction was substantially similar to the instruction approved by this court in Sawyers, 423 F.2d at 1342, and, therefore, was not unduly coercive.

Baker claims that the fact that the jury took only forty-one minutes to reach a verdict establishes that it was coerced by the supplemental instruction. However, the speed with which a jury returns a verdict after receiving a modified Allen charge is not decisive. See, e.g., Lowenfield v. Phelps, 484 U.S. 231 (1988) (fact that jury returned its verdict thirty minutes after the court gave a supplemental instruction was not coercive); United States v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994) (affirming conviction when verdict returned fifteen minutes after the instruction). The fact that the jury deliberated forty-one minutes after receiving the modified Allen charge suggests that the jury listened to the others' viewpoints rather than the minority simply being coerced into agreeing with the majority. Cf. United States v. Rogers, 289 F.2d 433, 436 (4th Cir. 1961) (verdict few minutes after Allen charge "hardly long enough to have permitted a painstaking re-examination of the views which the minority had held steadfastly until the charge was given").

Finally, Baker claims that the district court committed reversible error by failing to disclose the numerical split in the jury (nine to three) when it announced for the second time that it was deadlocked. We disagree. A modified Allen charge following disclosure of the jury split is not inherently coercive. See United States v. Lorenzo, 43 F.3d 1303, 1307 (9th Cir. 1995) (Allen charge following disclosure to district court judge of numerical split held permissible); United States v. Elkins, 885 F.2d 775, 784 (11th Cir. 1989) (same).

Accordingly, we affirm Baker's conviction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

U.S.C. 18 922 G

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of , a crime punishable by imprisonment for a term exceeding one year;

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.....a ship or transport in interstate or foreign commerce; or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.